STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, Complainant, v. FRANK COLUCCIO CONSTRUCTION COMPANY, Respondent.	CASE NO. OSH 2007-17 DECISION NO. 23 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AFFIRMING THE CITATION AND PENALTY

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
DECISION AFFIRMING THE CITATION AND PENALTY

On May 25, 2007, Complainant DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS (Director or Complainant), through the Hawaii Occupational Safety and Health Division (HIOSH), issued a Citation and Notification of Penalty (Citation) to Respondent FRANK COLUCCIO CONSTRUCTION COMPANY (Coluccio Construction Co. or Respondent); Respondent received the Citation on June 6, 2007. The Citation resulted from Inspection No. 310391172 conducted on April 10 through April 27, 2007, and alleged in Citation 1, Item 1, that 29 CFR 1926.651(b)(2) was violated because Respondent's work crew began drilling without using detection equipment or other acceptable means to check for possible utility installations prior to start of the actual drilling operations; as a result, Respondent's drilling machine's bit came into contact with a 3-inch Gas Company (GASCO) line on March 5, 2007, and with a Hawaiian Electric Company (HECO) underground 25kV primary line on March 6, 2007, which exposed employees to injuries. The Director characterized the violation as "Serious" and imposed a fine of $875.00.

By letter dated June 8, 2007, mailed on June 9, 2007, and received by the Director on June 12, 2007, Respondent contested the inspection and Citation. Pursuant to the initial conference in this matter held by the Hawaii Labor Relations Board (Board) on July 25, 2007, and attended by J. Gerard Lam, Deputy Attorney General, for Complainant, and Tim Pearia, for Respondent, the issues to be determined by the Board are:

A. Whether the citation resulting from Inspection No. 310391172 was valid and proper;

B. Whether the characterization of the violation as "Serious" is appropriate, and, if not, what is the appropriate characterization; and

C. Whether the penalty amount of $875.00 is appropriate, and, if not, what is the appropriate amount for the penalty.

An evidentiary hearing in this matter was held on November 14, 2007. The parties timely filed written closing statements/post-hearing briefs on December 21, 2007. Based on a thorough review of the entire record and the arguments presented by the parties, the Board[1] makes the following findings of fact, conclusions of law, and decision affirming the Director's Citation 1, Item 1, and its associated penalty.

FINDINGS OF FACT

1. The incidents at issue in the Citation occurred on March 5 and 6, 2007, on Kamakee St., near Queen St. The Citation states:

> 29 CFR 1926.651(b)(2) [Refer to chapter 12-132.2, HAR] was violated because:
>
> The employer's work crew began drilling without using detection equipment or other acceptable means to check for possible utility installations prior to the start of the actual drilling operations. As a result the SOILMEC SM-401 drilling machine's 8-inch drill bit came into contact with a 3-inch Gas Company line on March 5, 2007, and with a HECO underground 25kV primary line on March 6, 2007. Contact with utility lines expose the employees to injuries.
>
> 29 CFR 1926.651(b)(2) states "Utility companies or owners shall be contacted within established or customary local response times, advised of the proposed work, and asked to establish the location of the utility underground installations prior to the start of actual excavation. When utility companies or owners cannot respond to a request to locate underground utility installations within 24 hours (unless a

[1]Following the hearing in this matter, Board Member Sarah R. Hirakami recused herself from further proceedings in this case.

longer period is required by state or local law), or cannot establish the exact location of these installations, the employer may proceed, provided the employer does so with caution, and provided detection equipment or other acceptable means to locate utility installations are used."

2. "Toning" is a process for finding out where utilities are located underground, so contractors can avoid the area or use special precautions if utilities are there. The utilities use different colored marking to indicate where their underground lines are; for example, on the photographs in Complainant's Exhibit B, there are blue markings indicating the location of water lines.

3. The One Call Center is a "one-stop" shop where excavators can notify the appropriate utilities, such as electrical, gas, cable, fiber optics, water, or other underground utilities, for toning. The One Call Center provides an inquiry identification number to the excavator, and notifies any operator known to have a subsurface installation in the area of the proposed excavation.

4. The inquiry identification number from the One Call Center is valid for twenty-eight calendar days from the date of issuance, and after that date shall require center revalidation. An excavator may revalidate the inquiry identification number by applying to the center for revalidation prior to expiration. Excavators are required by state law[2] to maintain a valid inquiry identification number for the duration of the excavation.

5. The excavator that contacts the One Call Center must delineate the area to be excavated with white spray chalk or other suitable markings prior to calling the center; however, when white spray chalk may be misleading, misinterpreted, or duplicative, the excavator shall inform the center that the area shall instead be identified with flags, stakes, or stake chasers marked with the excavator's name, abbreviations, or initials, to enable the operator to determine the area of excavation.

6. Respondent was contracted by the Board of Water Supply and the City and County of Honolulu to work on improvements to the water and sewer systems on Kapiolani Blvd. from Ward Ave. to Kalakaua Ave., Kamakee St. from Auahi St. to Kapiolani Blvd., Atkinson Dr. from Ala Moana Blvd.

---

[2]Hawaii Revised Statutes (HRS) § 269E-7(b).

to Kapiolani Blvd., and Kalakaua Ave. From Ala Wai Blvd. to Kapiolani Blvd. The work started in September of 2006, and is expected to be completed around August of 2008.

7. On September 20, 2006, Respondent's Project Manager, Tim Pearia (Pearia), contacted the Hawaii One Call Center and requested toning by the utility companies for its work location, "FROM ABV INTER S APX ½ MI ALONG ENTIRE KAPIOLANI ST TO PIIKOI ST. THEN MARK FROM INTER OF KAPIOLANI ST AND KAMAKEE W ENTIRE KAMAKEE TO AUAHI." The date for Respondent's work to begin was noted as September 28, 2006.

8. On September 20, 2006, Respondent received Ticket number 6004278 from the Hawaii One Call Center.

9. The plans Respondent received from the Board of Water Supply did not show any utility lines in the work area, with the exception of the water lines. Generally, a consultant draws the plans and specifications, and the Board of Water Supply prepares the contract documents.

10. Respondent did not mark the area it was planning to excavate. The work area was so large that Respondent felt is was not practical to tone the entire area; rather, Respondent notified the One Call Center that it would be working on "Kamakee Street, from Auahi to Kapiolani, and could [the One Call Center] tone all that . . . from right of way to right of way[.]"

11. The electric company did not mark the location of their underground lines in Respondent's work area on Kamakee Street. There were water line markings, however. There were some gas line markings further away, but not in the immediate work area.

12. There are street lights near the area of Respondent's work on Kamakee Street, and no visible above-ground electrical lines.

13. Respondent did not begin excavation on Kamakee Street within twenty-eight days of the issuance of Hawaii One Call Center Ticket number 6004278, the period of its validity.

14. On January 18, 2007, Respondent contacted the One Call Center, requesting toning by the utility companies for its work location, "FROM ABV INTER S ALONG BOTH SIDES OF KAPIOLANI MARKING FULL ST TO PENASCOLA ST[.]" The date for Respondent's work to begin was noted

as January 26, 2007. Ticket number 7000308 was issued to Respondent on January 18, 2007.

15. The location of work indicated for Ticket number 7000308 is not the same location as for Ticket number 6004278, and thus is not a revalidation for the Kamakee Street work.

16. Respondent received a "Clearance to Excavate" form from HECO on or around January 23, 2007. The location general area was described as "Ala Moana, Kakaako" and the address as "Kapiolani Bv Bet Ward Av and Kalaukaua Av, Kamakee St, and Atkinson Dr[.]" Near the top of the form are three boxes labeled, "CLEAR TO EXCAVATE"; "FIELD VERIFICATION REQUIRED"; and "CALL THE HAWAII ONE CALL CENTER AT 1-866-423-7287 WHEN YOU ARE READY FOR THE TONE-OUT. FOR MORE INFORMATION GO TO www.callbeforeyoudig.org." The boxed labeled "CALL THE HAWAII ONE CALL CENTER . . . WHEN YOU ARE READY FOR THE TONE-OUT" was checked.

17. Respondent did not call HECO after receiving the January 23, 2007, Clearance to Excavate and prior to excavating on Kamakee Street.

18. Respondent did not do its own toning to locate electrical or gas lines on Kamakee Street prior to excavating.

19. At the time of the incidents on March 5 and 6, 2007, Respondent did not have a valid One Call Center ticket, Ticket number 6004278 expired on October 18, 2006.

20. On March 5 and 6, 2007, Respondent's crew was drilling in the work area on Kamakee Street to provide trench reinforcement prior to trenching and laying new sewer pipes in the trench. The work being performed by Respondent at the time of the incidents was not "emergency" work.

21. There were no electrical or gas tone marks at Respondent's excavation site, but markings were present in the intersection of Kamakee Street and Queen Street. There were water line tone marks in the work area.

22. On March 5, 2007, Respondent's crew hit a gas line located about 8-1/2 feet from the edge of the curb. After hitting the gas line, the crew contacted the GASCO to report the gas line was "blowing." The GASCO came out to the site and "pinched the line." A report from the GASCO regarding the

incident stated the GASCO's repair crew spliced a 6 foot length of 3-inch plastic piping to repair the leak.

23. On March 6, 2007, Respondent's crew hit an electrical line located about 9-1/2 feet from the edge of the curb, approximate one foot away from where the crew hit the gas line the day before. The Driller Foreman and the Driller were using a SOILMEC SM-401 drill at the time; both employees felt electrical shock when the drill hit the electrical line. Neither employee required medical treatment.

24. The SOILMEC SM-401 is a large drilling rig that can bore through asphalt, soil, and concrete casings.

25. The electrical line that was cut was a live 25kV (25,000 volt) line in a concrete casing.

26. HECO repaired the electrical line and reported the incident to HIOSH, which investigated the matter.

27. If the crew had reason to believe there were electrical lines in the area, they would "go slow and cautious" by pot holing the area (break the asphalt layer at the top and suck out the dirt underneath with the vacuum truck), or though "excavation and discovery" while drilling. These methods were not used by the crew on March 5 or 6, 2007.

28. There are instances where utilities failed to do correct toning; Respondent's Supervisor estimated that would occur an average of one time per year.

29. As of March, 2007, Respondent was unfamiliar with the requirement to revalidate the ticket received from the One Call Center, as the law was relatively new.

30. Respondent had no written training records and no written drilling procedures other than what it had in its safety program and Employee Safety Handbook. The Safety Handbook instructed employees to "[f]ind the location of all underground utilities prior to digging."

31. Based on its investigation, the Director issued the Citation. After receiving the Citation, Respondent changed its drilling procedure to "hand clear drillholes."

32. Respondent timely contested the Citation.

33. The violation here was "serious" because there is a substantial probability that an employee could have been seriously physically injured or died. The electrical line from which two workers received electrical shock was a live 25kV line posing an electrocution and shock hazard; additionally, the gas line rupture resulted in gas "blowing" from the line, presenting a risk of explosion, fire, and burns.

34. Given the voltage of the live electrical line and the gas "blowing" from the gas line, the Board finds that for each incident, there was a substantial probability that death or serious injury would result should an accident occur.

35. The Board further finds that the possibility that an accident, such as these two incidents, might occur was reasonably predictable.

36. The penalty was based on the type of hazard, the severity of the hazard, and the probability. With a "high" severity and "lesser" probability, the gravity-based penalty was $2,500.00. Due to Respondent's size, it received a reduction in penalty of 40%. Respondent also received a reduction of 15% for "good faith," based upon it having a safety and health program in place, and its plan to abate the violation. Respondent received a 10% reduction in penalty because it did not have a history of serious violations. The result was a penalty of $875.00.

37. The Board finds that the Citation is valid and proper, and the penalty amount is appropriate.

CONCLUSIONS OF LAW AND DISCUSSION

1. The Board has jurisdiction over this contested case pursuant to HRS §§ 396-3 and 396-11.

2. Respondent is an employer within the meaning of HRS § 396-3, which provides in relevant part:

> "Employer" means:
>
> * * *
>
> (5) Every person having direction, management, control, or custody of any employment, place of employment, or any employee.

3. The Director has the burden of proving a violation of a standard by a preponderance of the evidence.[3] The "preponderance of the evidence" standard directs the factfinder to decide whether the existence of the contested fact is more probable than its nonexistence; the party with the burden need only offer evidence sufficient to tip the scale slightly in the party's favor, while the party without the burden can succeed merely keeping the scale evenly balanced (see Kekona v. Abastillas, 113 Hawai`i 174, 180, 150 P.3d 823, 829 (2006) (citation omitted)).

4. Where a violation of a standard is characterized as serious, the Director has the additional burden as set forth in HRS § 396-3, which provides in relevant part:

> "Serious violation" means a violation that carries with it a substantial probability that death or serious physical harm could result from a condition that exists, or from one or more practices, means, methods, operations, or processes that have been adopted or are in use, in a place of employment, unless the employer did not, and could not with the exercise of reasonable diligence, have known of the presence of the violation.

See National Engineering & Contracting Co. v. Occupational Safety & Health Admin., 928 F.2d 762, 767 (6th Cir. 1991).

5. A serious violation under HRS § 396-3 is any violation of a regulation which renders an accident with a substantial probability of death or serious injury possible. Director v. Charles Pankow Builders, Inc., OSAB 91-015 (January 28, 1992).

6. In Director v. Fritz's European Bakery, OSAB 96-025 (Oct. 6, 1998), the Hawaii Labor and Industrial Relations Appeals Board (Appeals Board) construed the term "serious violation" as one which "renders an accident with a substantial probability of death or serious injury possible. In other words, [the Appeals Board] look[s] to both (1) the possibility of an accident resulting from the conditions at work and (2) the substantial probability that death or serious physical harm could result if an accident did occur." Id., at page 5. The Appeals Board noted that this construction was consistent with the identically defined term under the federal standards by the Ninth Circuit

---

[3]See HRS § 91-10(5).

Court of Appeals in California Stevedore & Ballast Co. v. OSHRC, 517 F.2d 986 (9th Cir. 1978). The Appeals Board further stated, "because anything is possible and because it has been generally recognized that the intent of the occupational safety and health standards is to require employers to eliminate all foreseeable and preventable hazards, . . . we conclude that, in determining whether a violation is serious under our standard, the possibility of the type of accident that could occur must at least be reasonably predictable[.]" Id. at page 6.

7. To establish a violation of a standard, the Director must prove that: (A) the cited standard applies, (B) there was a failure to comply with the cited standard, (C) an employee had access to the violative condition, and (D) the employer knew or could have known of the condition with the exercise of reasonable diligence. Director v. Maryl Pacific Constructors, Inc., OSAB 2001-18 (6/13/02); Secretary of Labor v. Astra Pharmaceutical Products, Inc., 9 O.S.H. Cas. (BNA) 2126, OSHRC Docket No. 78-6247 (July 30, 1981).

The Standard Applies

8. The work being performed by Respondent at the time of the incidents on March 5 and 6, 2007, constituted construction work pursuant to Hawaii Administrative Rules (HAR) § 12-110-1, which defines the term "construction work" as meaning "work for construction, alteration, demolition, or repair including painting and decorating, erection of new electrical transmission and distribution lines and equipment, and the alteration, conversion, and improvement of existing transmission and distribution lines and equipment."

9. 29 CFR 1926.651(b)(2) provides:

> Utility companies or owners shall be contacted within established or customary local response times, advised of the proposed work, and asked to establish the location of the utility underground installations prior to the start of actual excavation. When utility companies or owners cannot respond to a request to locate underground utility installations within 24 hours (unless a longer period is required by state or local law), or cannot establish the exact location of these installations, the employer may proceed, provided the employer does so with caution, and provided detection

equipment or other acceptable means to locate utility installations are used.

10. 29 CFR § 1926.651(b)(2) is incorporated in Title 12, Subtitle 8, Part 3, Chapter 132.2, of HAR, Department of Labor and Industrial Relations, Division of Occupational Safety and Health, Construction Standards, Fall Protection, by HAR § 12-132.2-1.

11. Accordingly, the standard, 29 CFR § 1926.651(b)(2) applies, because at the time of the incidents, Respondent was an employer performing construction work – removing, altering, or repairing the City and County of Honolulu's underground sewer lines.

Failure to Comply with the Standard

12. 29 CFR 1926.651(b)(2) provides:

> Utility companies or owners shall be contacted within established or customary local response times, advised of the proposed work, and asked to establish the location of the utility underground installations prior to the start of actual excavation. When utility companies or owners cannot respond to a request to locate underground utility installations within 24 hours (unless a longer period is required by state or local law), or cannot establish the exact location of these installations, the employer may proceed, provided the employer does so with caution, and provided detection equipment or other acceptable means to locate utility installations are used.

13. The standard does not articulate any particular method of contacting utility companies or owners; however, HRS § 269E-7(a) establishes the required method for notifying utilities of planned excavation:

> Except in an emergency, every excavator planning to conduct an excavation on public or private property shall notify the [One Call Center] of the excavation at least five working days but not more than twenty-eight calendar days prior to commencing excavation.

14. Respondent did not notify the One Call Center during the time period required by statute. Although Respondent notified the One Call Center on

September 20, 2006, of the planned excavation work on Kamakee Street, the ticket Respondent received was valid for only 28 days; after that, Respondent was required to revalidate the ticket or get a new one. Respondent was also required to maintain a valid ticket for the duration of the excavation.[4]

15. On January 18, 2007, Respondent contacted the One Call Center, requesting toning by the utility companies, and was issued Ticket number 7000308. However, the location of work indicated for Ticket number 7000308 was not the same location as for Ticket number 6004278, and thus is not a revalidation for the Kamakee Street work. Moreover, the information provided for Ticket number 7000308 did not mention work on Kamakee Street, and did not provide the One Call Center, or the utilities that the One Call Center notifies, actual notice of the excavation work that Respondent would be performing on Kamakee Street.

16. Although the Board does not administer HRS chapter 269E, the Board takes notice of the provisions of that chapter with respect to the type of notification that contractors are required to provide prior to excavating. Had the requirements of chapter 269E been complied with, Respondent would have satisfied its duty under 29 CFR 1926.651(b)(2) to contact utility companies or owners to establish the location of underground utilities.[5]

---

[4]See HRS § 269E-7(b), which provides in relevant part:

> The center shall provide an inquiry identification number to an excavator who contacts the center and shall, on that same day, notify any operator known to have a subsurface installation in the area of the proposed excavation. The inquiry identification number shall remain valid for not more than twenty-eight calendar days from the date of issuance, and after that date shall require center revalidation. An excavator may revalidate the inquiry identification number by applying to the center for revalidation prior to expiration. The excavator shall maintain a valid inquiry identification number for the duration of the excavation.

[5]The Board also notes that Respondent failed to comply with the requirements of HRS § 269E-8, which provides:

> The excavator shall delineate the area to be excavated with white spray chalk or other suitable markings prior to calling the center. The excavator shall indicate the entire dimension of the excavation by known industrial practices and display the excavator's name,

17. Although Respondent received a "Clearance to Excavate" form from HECO on or around January 23, 2007, the box labeled "CALL THE HAWAII ONE CALL CENTER . . . WHEN YOU ARE READY FOR THE TONE-OUT" was checked off. Accordingly, Respondent could not have assumed that HECO had completed its tone-out prior to Respondent's excavation work on Kamakee Street.

18. Additionally, the standard provides that when utility companies or owners cannot respond to a request to locate underground utility installations within 24 hours (unless a longer period is required by state or local law), or cannot establish the exact location of these installations, the employer may proceed, provided the employer does so with caution, and provided detection equipment or other acceptable means to locate utility installations are used. Here, the Board finds that Respondent did not proceed with the necessary caution and did not use detection equipment or other mean to locate utility installations itself. Respondent did not attempt to tone for electrical or gas lines itself; Respondent did not use pot holing or its "excavation and discovery" method while drilling; Respondent did not use hand-digging methods; and Respondent did not attempt to contact the utilities just prior to excavation.

19. For these reasons, the Board concludes that Respondent failed to comply with the standard.

An Employee Had Access to the Violative Condition

20. To prove employee exposure to a hazardous condition, the Director need not prove that a given employee was actually endangered by the unsafe condition, but only that it was reasonably certain that some employee was or could be exposed to that danger. Mineral Indus. v. Occupational Safety & Health Review Comm'n., 639 F.2d 1289, 1294 (5th Cir. 1981).

21. On March 6, 2007, two of Respondent's employees received an electrical shock when the drilling rig came into contact with the live electrical line. Additionally, employees were present on March 5, 2007, when Respondent's drilling rig cut into the gas line, causing the gas to be "blowing." Given the risk of fire, explosion, and electric shock that the incidents presented, it was reasonably certain that some employee could be exposed to that danger. The employee operating the SOILMEC would have

---

abbreviations, or initials next to or in the white spray chalk markings to identify the excavation site.

been standing only a few feet away from the drill tip when the gas and electrical lines were cut.

Respondent Knew or Could Have Known of the Condition with the Exercise of Reasonable Diligence

22. Actual knowledge of the violative condition is not required. Employer knowledge is shown if the employer could have known of the hazardous condition with the exercise of reasonable diligence. Austin Building Co. v. Occupational Safety & Health Review Comm'n., 647 F.2d 1063, 1068 (10th Cir. 1981).

23. Respondent had actual and constructive knowledge that drilling without proper notice to the utility companies or use of precautionary measures would violate 29 CFR 1926.651(b)(2) and pose a hazard to its employees.

24. The Clearance to Excavate form that Respondent received from HECO on or about January 23, 2007, clearly required further action from Respondent before excavation could take place. The form required Respondent to contact the One Call Center when Respondent was "ready for the tone-out." This clearly indicated that tone-out had not yet been performed by the electric company.

25. There were electric street lights visible in area, although there were no above-ground electric lines in sight. This would have given Respondent a clue that there were underground electric lines *somewhere* in the vicinity, alerting Respondent to use more cautious digging methods.

26. On March 5, 2007, Respondent's workers encountered an unmarked gas line. This should have alerted Respondent that there may have been a problem with notification to the utilities by the One Call Center,[6] prompting Respondent to use more cautious digging methods. However, the very next day, Respondent used the same drilling method and encountered a live electrical line approximately one foot away from where it encountered the gas line.

27. Chapter 269E, HRS, provides the standards that contractors are required to follow prior to excavating, and Respondent failed to comply with those standards. Although the law was relatively new, it was in effect at all times

---

[6]As discussed earlier, there was a failure by Respondent to satisfy the requirements under HRS chapter 269E governing the One Call Center.

relevant to this case and could have been discovered through reasonable diligence by Respondent.

28. For these reasons, the Board upholds the Citation.

29. The characterization of the violation as "serious" is appropriate. The SOILMEC was able to cut through the concrete casing around the electrical line, and the employees operating the SOILMEC stand only a few feet away. Given these conditions, the possibility of an accident resulting from the violative condition was at least reasonably predictable. Further, the high voltage in the live electric line, 25kV, and the "blowing" gas from the gas line, made the risk of death or serious physical injury substantially probable, should an accident occur."

30. Accordingly, the Board finds the penalty amount proper.

31. The Board therefore affirms the Citation 1, Item 1, and its associated penalty of $875.00.

ORDER

For the above-discussed reasons, the Board hereby affirms Citation 1, Item 1, resulting from Inspection number 310391172, and its associated penalty of $875.00.

DATED: Honolulu, Hawaii, January 25, 2008.

HAWAII LABOR RELATIONS BOARD

JAMES B. NICHOLSON, Chair

EMORY J. SPRINGER, Member

NOTICE TO EMPLOYER

You are required to post a copy of this Order at or near where citations under the Hawaii Occupational Safety and Health Law are posted at least five working days prior to the

trial date. Further, you are required to furnish a copy of this Order to a duly recognized representative of the employees, if any, at least five working days prior to the trial date.

Copies sent to:

J. Gerard Lam, Deputy Attorney General
Tim Pearia